

Ninth Circuit Application of Categorical Approach

A. Categorical Approach Applied

- “Crime involving moral turpitude” under INA § 212(a)(2)(A)(i)(I) and INA § 237(a)(2)(A)(i). *Barragan-Lopez v. Mukasey*, 508 F.3d 889, 903-05 (9th Cir. 2007) (conviction for solicitation to possess at least 4 pounds of marijuana for sale, in violation of Ariz. Rev. Stat. §§ 13-1002(A), (B)(2), and 13-3405(A)(2), is categorically a CIMT); *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 925-26 (9th Cir. 2007) (conviction for actual driving under the influence while driving on a suspended or revoked license, in violation of Ariz. Rev. Stat. § 28-1383(A)(1) is categorically a CIMT); *Gonzales-Alvarado v. INS*, 39 F.3d 245, 246-47 (9th Cir. 1994) (conviction for first-degree incest, in violation of Wash. Rev. Code § 9A.64.020, is categorically a CIMT); *Grageda v. U.S. INS*, 12 F.3d 919, 921-22 (9th Cir. 1993) (conviction for willful infliction of injury to a spouse, in violation of Cal. Penal Code § 273.5(a), is categorically a CIMT). *Cf. Cerezo v. Mukasey*, No. 05-74688, 2008 WL 115184 (9th Cir. 2008) (publication pending) (conviction for leaving the scene of an accident resulting in bodily injury or death, in violation of Cal. Vehicle Code § 20001(a), is not categorically a CIMT); *Quintero-Salazar v. Keisler*, 506 F.3d 688, 692-94 (9th Cir. 2007) (conviction for engaging in intercourse with a minor who is under 16 years of age when the perpetrator is 21 years of age or older, in violation of Cal. Penal Code § 261.5(d) is not categorically a CIMT); *Narravo-Lopez v. Gonzales*, 503 F.3d 1063, 1068-73 (9th Cir. 2007) (conviction for accessory after the fact, in violation of California Penal Code § 32, is not categorically a CIMT); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1058-62 (9th Cir. 2006) (conviction for domestic battery, in violation of Cal. Penal Code § 243(e), is not categorically a CIMT); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005) (conviction for being an accomplice to residential burglary, in violation of Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3), is not categorically a CIMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163-68 (9th Cir. 2006) (convictions for misdemeanor domestic violence/assault, in violation of Ariz. Rev. Stat. §§ 13-1203 and 3601, are not categorically CIMTs); *Notash v. Gonzales*, 427 F.3d 693, 696-699 (9th Cir. 2005) (conviction for attempted entry of goods by means of false statement, in violation of 18 U.S.C. § 542, is not categorically a CIMT); *Goldeshtein v. INS*, 8 F.3d 645, 646-50 (9th Cir. 1993) (conviction for structuring financial transactions with domestic financial institutions to avoid currency reporting requirement, in violation of 31 U.S.C. §§ 5324(a)(3) and 5322(b), and 18 U.S.C. § 2, is not categorically a CIMT); *Matter of Sanudo*, 23 I&N Dec. 968, 970-73 (BIA 2006) (conviction for domestic battery, in violation of Cal. Penal Code §§ 242 and 243(e)(1), is not categorically a CIMT).

- “Crime for which a sentence of one year or longer may be imposed” under INA § 237(a)(2)(A)(i)(II). *Rusz v. Ashcroft*, 376 F.3d 1182, 1184-85 (9th Cir. 2004) (conviction for petty theft with a prior qualifying offense, in violation of Cal. Penal Code §§ 484/488/666 scheme, does not categorically carry a maximum possible sentence of over one year).

- Law or regulation relating to a controlled substance under INA § 212(a)(2)(A)(i)(II) and INA § 237(a)(2)(B). *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078-79 (9th Cir. 2007) (conviction for possession of a controlled substance, in violation of Cal. Health & Safety Code § 11379(a), is not categorically a law relating to a controlled substance); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154-56 (9th Cir. 2003) (convictions for conspiracy to commit money laundering, in violation of Ariz. Rev. Stat. § 13-1003 and 13-2317(A)(1) and (C), are not categorically a law relating to a controlled substance).

- Coming to the United States solely, principally, or incidentally to engage in prostitution or has engaged in prostitution within ten years of date of application under

INA § 212(a)(2)(D)(i). *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006) (conviction for prostitution, in violation of Hawaii Rev. Stat. § 712-12000, is not categorically prostitution).

- Domestic violence, stalking, and child abuse under INA § 237(a)(2)(E)(i). *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391 (9th Cir. 2006) (conviction for simple battery, in violation of Cal. Penal Code § 242, is not categorically a crime of domestic violence); *Tokatly v. Ashcroft*, 371 F.3d 613, 619-23 (9th Cir. 2004) (convictions for burglary in the first degree and attempted kidnapping in the first degree, in violation of Or. Rev. Stat. §§ 164.225 and 163.235, were not categorically crimes of domestic violence) (applying categorical approach in determining whether conviction is “domestic” and “crime of violence”); *Matter of Sanudo*, 23 I&N Dec. 968, 973-74 (BIA 2006) (conviction for domestic battery, in violation of Cal. Penal Code §§ 242 and 243(e)(1), is not categorically a crime of domestic violence).

- Certain firearms offenses under INA § 237(a)(2)(C). *Matter of Pichardo*, 21 I&N Dec. 330, 334-35 (BIA 1996) (under former INA § 241(a)(2)(C)).

- Sexual abuse of a minor under INA § 101(a)(43)(A). *Estrada-Espinoza v. Gonzales*, 498 F.3d 933, 935-36 (9th Cir. 2007) (conviction for statutory rape, in violation of Cal. Penal Code § 261.5(c) is categorically sexual abuse of a minor); *Afridi v. Gonzales*, 442 F.3d 1212, 1217 (9th Cir. 2006) (conviction for unlawful sexual intercourse with a minor who is more than three years that the perpetrator, in violation of Cal. Penal Code § 261.5, is categorically sexual abuse of a minor); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1065-67 (9th Cir. 2003) (conviction for lewdness with a child under fourteen years of age, in violation of Nev. Rev. Stat. § 21.230, is categorically sexual abuse of a minor). *Cf. Rebilas v. Keisler*, 506 F.3d 1161, 1163-64 (9th Cir. 2007) (conviction for attempted public sexual indecency to a minor, in violation of Ariz. Rev. Stat. §§ 13-1001 and 13-1403(B), is not categorically sexual abuse of a minor); *Parrilla v. Gonzales*, 414 1038, 1041-43 (9th Cir. 2005) (conviction for communication with a minor for immoral purposes, in violation of Wash. Rev. Code § 9.68A.090, is not categorically sexual abuse of a minor).

- Rape under INA § 101(a)(43)(A). *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000) (conviction for rape, in violation of Cal. Penal Code § 261(a)(3), is categorically “rape”).

- Illicit trafficking in a controlled substance including a drug trafficking crime under INA § 101(a)(43)(B). *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1127-28 (9th Cir. 2007) (conviction for transportation, sale, furnishing, administering, etc. or offering to do the same, of a controlled substance, in violation of Cal. Health & Safety Code § 11379(a) is not categorically illicit trafficking); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152-53 (9th Cir. 2003) (convictions for conspiracy to commit money laundering, in violation of Ariz. Rev. Stat. § 13-1003 and 13-2317(A)(1) and (C), are not categorically illicit trafficking).

- Offense described in 18 U.S.C. § 1956 (relating to laundering of monetary instruments or 18 U.S.C. § 1957 (relating to engaging in monetary transactions in property derived from specific lawful activity) if the amount of the funds exceeded \$10,000 under INA § 101(a)(43)(D). *Chowdhury v. INS*, 249 F.3d 970, 972-75 (9th Cir. 2001) (conviction for money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A), is categorically an offense relating to money laundering, but does not categorically involve amount of funds exceeding \$10,000) (finding that “amount of funds” refers to amount of funds laundered, not loss to victim).

- Crime of violence (as defined in 18 U.S.C. § 16, but not including purely political offense) for which term of imprisonment is at least one year under INA §

101(a)(43)(F). *Estrada-Rodriguez v. Mukasey*, No. 06-75064, 2007 WL 4554053 (9th Cir. 2007) (publication pending) (conviction for resisting arrest, in violation of Ariz. Rev. Stat. § 13-2508, is categorically a crime of violence under 18 U.S.C. § 16(b)); *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1221-22 (9th Cir. 2004) (conviction of mayhem, in violation of Cal. Penal Code § 203, is categorically a crime of violence). *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 6-13 (2004) (conviction for DUI and causing serious bodily injury, in violation of Fla. Stat. § 316.193, is not categorically a crime of violence); *Perez v. Mukasey*, No. 06-73523, 2008 WL 170316 (9th Cir. 2008) (publication pending) (conviction for domestic violence assault in the fourth degree, in violation of Rev. Code Wash. §§ 9A.36.041 and 10.99.020, is not categorically a crime of violence under 18 U.S.C. § 16(a)); *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007) (conviction for recklessly setting fire to a structure or forest land, in violation of Cal. Penal Code § 452(c), is not categorically crime of violence under 8 U.S.C. § 16(b)); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (conviction for stalking, in violation of Cal. Penal Code § 649, is not categorically a crime of violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1014-20 (9th Cir. 2006) (conviction for simple battery, in violation of Cal. Penal Code § 242, is not categorically a crime of violence); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2001) (conviction for driving under the influence with multiple prior convictions, in violation of Cal. Veh. Code § 23152(a) and 23175, is not categorically a crime of violence); *Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000) (convictions for vehicle burglary, in violation of Cal. Penal Code § 459, are not categorically crimes of violence).

- Theft offense under INA § 101(a)(43)(G). *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169-70 (9th Cir. 2006) (conviction for “theft by control of property with a value of \$250 or more,” in violation of Ariz. Rev. Stat. § 13-1802(A)(1) and (C), is categorically a theft offense); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1151-54 (9th Cir. 2002) (conviction for possession of stolen mail, in violation of 18 U.S.C. § 1708, is categorically a theft offense). *Cf. United States v. Vidal*, 504 F.3d 1072, 1077-1086 (9th Cir. 2007) (conviction for unauthorized driving or taking of a vehicle, in violation of Cal. Veh. Code Ann. § 10851(a), is not categorically a theft offense); *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003) (conviction for theft of means of transportation, in violation of Ariz. Rev. Stat. § 13-1814, is not categorically a theft offense); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-87 (9th Cir. 2003) (conviction for possession of a stolen vehicle, in violation of Ariz. Rev. Stat. § 13-1802, is not categorically a theft offense).

- Burglary offense under INA § 101(a)(43)(G). *Ye v. INS*, 214 F.3d 1128, 1131-33 (9th Cir. 2000) (convictions for vehicle burglary, in violation of Cal. Penal Code § 459, are not categorically burglary offenses).

- Offense that involves fraud or deceit and loss to victim exceeds \$10,000 under INA § 101(a)(43)(M). *Ferreira v. Ashcroft*, 390 F.3d 1091, 1096-98 (9th Cir. 2004) (conviction for submitting false statement to obtain aid, in violation of Cal. Welfare and Institutions Code § 10980(c)(2), categorically involves fraud or deceit, but does not categorically involve loss to victim exceeding \$10,000); *Cf. Kawashima v. Gonzales*, 503 F.3d 997, 1002 (9th Cir. 2007) (convictions for subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1), and for aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2), categorically involve fraud or deceit, but do not categorically involve loss to victim exceeding \$10,000); *Kharana v. Gonzales*, 1283-84 (9th Cir. 2007) (conviction for obtaining money under false pretenses, in violation of Cal. Penal Code § 532, categorically involves fraud or deceit, but does not categorically involve loss to victim exceeding \$10,000); *Li v. Ashcroft*, 389 F.3d 892, 896-97 (9th Cir. 2004) (convictions for fraud-related offenses, in violation of 18 U.S.C. §§ 2, 287, 371, and 1001, do not categorically involve loss to victim exceeding \$10,000); *Chang v. Ashcroft*, 307 F.3d 1185, 1189 (9th Cir. 2002) (conviction for bank fraud, in violation of 18 U.S.C. §

1344, categorically involves fraud or deceit, but does not categorically involve loss to victim exceeding \$10,000).

- Offense described in INA § 274(a)(1)(A) or (2) (relating to alien smuggling) under INA § 101(a)(43)(N). *Castro-Espinoza v. Ashcroft*, 257 F.3d 1130, 1131-32 (9th Cir. 2001) (conviction for harboring and aiding and abetting the harboring of an illegal alien, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), is categorically an offense related to alien smuggling).
- Offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles for which the term of imprisonment is at least one year under INA § 101(a)(43)(R). *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1054-58 (9th Cir. 2006) (conviction for forgery of a check, in violation of Cal. Penal Code § 476, is categorically an offense related to forgery); *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073-74 (9th Cir. 2000) (conviction for possession of counterfeit obligations of the United States, in violation of 18 U.S.C. § 472, is categorically an offense related to counterfeiting). *Cf. Vizcarra-Ayala v. Mukasey*, No. 06-73237, 2008 WL184954 (9th Cir. 2008) (publication pending) (conviction for forgery, in violation of Cal. Penal Code § 475(c) is not categorically an offense relating to forgery).

B. Underlying Facts of Conviction Are Judicially Noticeable

- Particularly serious crime. *Afridi v. Gonzales*, 442 F.3d 1212, 1218-1221 (9th Cir. 2006) (remanding to BIA for case-specific analysis as to whether conviction unlawful sexual intercourse with a minor is a particularly serious crime); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1031-32 (9th Cir. 1990) (remanding to BIA to consider type of sentence and underlying facts of conviction for sale of marijuana); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1396 (9th Cir. 1987); *Mahini v. INS*, 779 F.2d 1419, 1420-21 (9th Cir. 1986) (affirming BIA's finding that conviction for distribution of heroin with intent to distribute was a particularly serious crime where BIA considered several *Frentescu* factors); *Matter of L-S-*, 22 I&N Dec. 645, 656 (BIA 1999) (employing *Frentescu* factors to determine whether conviction for bringing an illegal alien into United States constituted a particularly serious crime); *Matter of Frentescu*, 18 I&N Dec. 244, 247-48 (BIA 1982) (finding that whether a crime is particularly serious requires case-by-case analysis, using "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community).
- Violent or dangerous crime. *Matter of Jean*, 23 I&N Dec. 373 (AG 2002) (waiver under INA § 209(c)).

Note that *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) now directs that Immigration Judges should follow the Attorney General's framework for CIMT determinations.